

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRAVELERS CASUALTY AND SURETY COMPANY
as Administrator for RELIANCE INSURANCE
COMPANY,

Plaintiff,

- against -

DORMITORY AUTHORITY – STATE OF NEW
YORK, TDX CONSTRUCTION CORP., and KOHN
PEDERSEN FOX ASSOCIATES, P.C.,

Defendants.

AND THIRD AND FOURTH PARTY ACTIONS.

Case No. 07 Civ. 6915 (DLC)

Consolidated with
Case No. 08 Civ. 6239 (DLC)

AFFIDAVIT OF TIMOTHY B.
FROESSEL IN OPPOSITION
TO MOTION SEEKING
SANCTIONS FOR ALLEGED
SPOILIATION OF EVIDENCE

In Re:

G.M. CROCETTI, INC.,

Debtor.

Case No. 08 Civ. 6293 (DLC)
(Consolidated Action)

G.M. CROCETTI, INC.,

Plaintiff,

- against -

TRATAROS CONSTRUCTION, INC. and TRAVELERS
CASUALTY AND SURETY COMPANY,

Defendants.

TRATAROS CONSTRUCTION. INC. and
TRAVELERS CASUALTY AND SURETY
COMPANY,

Third-Party Plaintiffs,

- against -

DORMITORY AUTHORITY - STATE OF NEW
YORK, et al.,

Third-Party Defendants.

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

TIMOTHY B. FROESSEL, being duly sworn, deposes and says:

1. I am an attorney with the law firm of Holland & Knight LLP, attorneys for defendants Dormitory Authority of the State of New York ("DASNY") and TDX Construction Corp. ("TDX") in the above-captioned action. I am fully familiar with the facts set forth below, and submit this affidavit in further support of DASNY's and TDX's opposition to the motion in limine filed by Bartec Industries, Inc. ("Bartec"), Dayton Superior Corporation, G.M. Crocetti, Inc., and Carolina Casualty Insurance Company (collectively the "Moving Parties"), which seeks sanctions pursuant to Fed. R. Civ. P. 37.

2. Ray Leu of TDX was deposed in this action on June 11, 2008. True and correct copies of relevant pages of Mr. Leu's deposition transcript from that date are attached hereto as **Exhibit 1**.

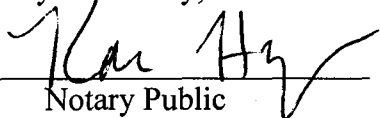
3. Craig Negus of Bartec was deposed in this action on August 12, 2008. True and correct copies of relevant pages of Mr. Negus' deposition transcript from that date are attached hereto as **Exhibit 2**.

4. The "Chop and Fill Survey" discussed during Mr. Leu's deposition was kept with TDX's Project records and was made available during document production to the Moving Parties.

WHEREFORE, it is respectfully requested that the Court enter an order denying the Moving Parties' motion in its entirety, together with other and further relief as the Court may deem just and proper.


TIMOTHY B. FROESSEL

Sworn to before me this
24th day of January, 2011


Notary Public

KAREN HIPPNER
Notary Public, State of New York
No. 01HI6100493
Qualified in Suffolk County
Commission Expires October 20, 2011

EXHIBIT 1

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----
5 TRAVELERS CASUALTY AND SURETY COMPANY as
6 Administrator for RELIANCE INSURANCE
7 COMPANY,

8 Plaintiff,

9 -against-

10 DORMITORY AUTHORITY-STATE OF NEW YORK, TDX
11 CONSTRUCTION CORP. and KOHN PEDERSEN FOX
12 ASSOCIATES, P.C.,

13 Defendants.

14 Case No. 08-CV-6915 (DLC)

15 (CAPTION CONTINUED)
16 -----

17 June 11, 2008

18 10:09 a.m.

19 CONTINUED DEPOSITION of RAY LEU,
20 taken by Plaintiff, pursuant to Notice,
21 held at the offices of HOLLAND & KNIGHT
22 LLP, 195 Broadway, New York, New York
23 before Wayne Hock, a Notary Public of the
24 State of New York.
25

<p style="text-align: right;">425</p> <p>1 R. Leu</p> <p>2 other than those that you just told me</p> <p>3 about?</p> <p>4 A. I don't recall.</p> <p>5 Q. You don't recall any other areas</p> <p>6 other than those three areas that you just</p> <p>7 told me about of you physically observing</p> <p>8 delamination?</p> <p>9 A. I don't recall subsequently</p> <p>10 after that what other time frames there</p> <p>11 were other areas that I observed, areas in</p> <p>12 the 24th Street turnstile area.</p> <p>13 Q. That's down on the ground floor</p> <p>14 again?</p> <p>15 A. Down on the ground floor.</p> <p>16 There's like a student lounge</p> <p>17 area on the ground floor right off the</p> <p>18 24th Street entrance.</p> <p>19 Q. Anywhere else?</p> <p>20 A. Not that I recall at this</p> <p>21 moment.</p> <p>22 Q. Any in the sub-ground levels?</p> <p>23 MR. SHAPIRO: The basement</p> <p>24 levels?</p> <p>25 MR. PLATEK: Sure. That's</p>	<p style="text-align: right;">427</p> <p>1 R. Leu</p> <p>2 Q. Do you know if it was on slab?</p> <p>3 A. No, I do not know if it was on</p> <p>4 slab.</p> <p>5 Q. Are you aware of anyone who</p> <p>6 knows the answers to those questions?</p> <p>7 A. No.</p> <p>8 Q. And the ground floor east</p> <p>9 corner, do you know if that was on</p> <p>10 Conflow, that area of delamination?</p> <p>11 A. No, not definitively, no.</p> <p>12 Q. Do you know if that was on</p> <p>13 Mapacem?</p> <p>14 A. No, it was not on Mapacem.</p> <p>15 Q. No, you don't know or --</p> <p>16 A. No, it's not on Mapacem.</p> <p>17 Q. How do you know that?</p> <p>18 A. Because we gave a change order</p> <p>19 to Crocetti for certain areas to put</p> <p>20 Mapacem as a change order and that area</p> <p>21 was not part of the change order.</p> <p>22 Q. But the second floor was part of</p> <p>23 that change order?</p> <p>24 A. We did it around the elevator</p> <p>25 lobbies, I think we may have did some</p>
<p style="text-align: right;">426</p> <p>1 R. Leu</p> <p>2 sub-ground.</p> <p>3 A. I don't recall seeing that.</p> <p>4 Q. Any in the levels above the</p> <p>5 second floor?</p> <p>6 A. I don't recall seeing any.</p> <p>7 Q. And when you use the term</p> <p>8 "delamination," what exactly do you mean</p> <p>9 by that term?</p> <p>10 A. I notice a curling of the</p> <p>11 terrazzo panels from the zinc strip. You</p> <p>12 could feel some rocking when you step on</p> <p>13 the edge; you feel some softness.</p> <p>14 Q. Now, that first area you</p> <p>15 described on the second floor south of the</p> <p>16 escalators, do you know, the terrazzo you</p> <p>17 observed delaminated, what substrate that</p> <p>18 was on?</p> <p>19 A. No, I do not know.</p> <p>20 Q. You don't know if it's Conflow?</p> <p>21 A. No, I do not know if it's</p> <p>22 Conflow.</p> <p>23 Q. Do you know if it was Mapacem?</p> <p>24 A. No, I do not know at this</p> <p>25 moment, no.</p>	<p style="text-align: right;">428</p> <p>1 R. Leu</p> <p>2 around the escalator landing because those</p> <p>3 are high traffic areas where we would need</p> <p>4 a fast setting time, but I do know if it's</p> <p>5 not on the eastern corner of the ground</p> <p>6 floor.</p> <p>7 Q. Do you know if on that eastern</p> <p>8 corner the terrazzo was installed on slab?</p> <p>9 A. I don't know that definitively.</p> <p>10 Q. Do you know anyone who does know</p> <p>11 the answer as to whether or not that area</p> <p>12 of delamination of the ground floor east</p> <p>13 corner was installed on slab or on</p> <p>14 Conflow?</p> <p>15 A. No.</p> <p>16 Q. Do you know of any documents</p> <p>17 that would indicate whether or not that</p> <p>18 area was installed on slab or Conflow?</p> <p>19 A. Yes.</p> <p>20 Q. What documents would indicate</p> <p>21 that?</p> <p>22 A. Bartec had produced a survey, a</p> <p>23 five foot grid survey of the existing</p> <p>24 conditions on the slabs. Based on that</p> <p>25 survey, direction was given of where to</p>

50 (Pages 425 to 428)

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<p style="text-align: right;">429</p> <p>1 R. Leu</p> <p>2 put Conflow and where are we going to</p> <p>3 scarify. And that particular area, I'd</p> <p>4 have to take a look at the documents, it's</p> <p>5 not an exact science because what we did</p> <p>6 on the survey was we just highlighted the</p> <p>7 areas where we needed some floor filled to</p> <p>8 meet KPF's tolerances. To correlate to</p> <p>9 the exact area where it has delaminated, I</p> <p>10 cannot tell you that.</p> <p>11 Q. Who's in possession of that</p> <p>12 survey?</p> <p>13 A. We have it as part of the job</p> <p>14 documents at site A.</p> <p>15 Q. The area in the lobby by the</p> <p>16 turnstile entrance at 25th Street that you</p> <p>17 said you observed delamination, are you</p> <p>18 aware whether or not that terrazzo was</p> <p>19 installed over Conflow?</p> <p>20 A. I do not know that definitively.</p> <p>21 Q. Do you know whether it was</p> <p>22 installed over slab?</p> <p>23 A. I do not know that definitively.</p> <p>24 Q. Do you know if it was installed</p> <p>25 over Mapacem?</p>	<p style="text-align: right;">431</p> <p>1 R. Leu</p> <p>2 Q. How about the ground floor</p> <p>3 student lounge, do you know if that area</p> <p>4 of delamination was installed over</p> <p>5 Conflow?</p> <p>6 A. I do not know that.</p> <p>7 Q. Do you know if it was installed</p> <p>8 over slab?</p> <p>9 A. I do not know that.</p> <p>10 Q. Do you know if it was installed</p> <p>11 over Mapacem?</p> <p>12 A. I'd have to take a look at that</p> <p>13 change order again and see if that was one</p> <p>14 of the areas.</p> <p>15 Q. Let's go to T50.</p> <p>16 This is, you earlier testified,</p> <p>17 was a survey performed by TDX of areas</p> <p>18 that were sounded and -- and sounded</p> <p>19 hollow by broomstick sounding; is that</p> <p>20 correct?</p> <p>21 A. That's correct.</p> <p>22 Q. It's now 4:07. I could go</p> <p>23 through each and every one of these</p> <p>24 circles with you, but I think I'll ask you</p> <p>25 generally first, if I were to go through</p>
<p style="text-align: right;">430</p> <p>1 R. Leu</p> <p>2 A. I do not think it was installed</p> <p>3 over Mapacem. Again, the change order</p> <p>4 does not specify those areas to receive</p> <p>5 Mapacem.</p> <p>6 Q. Would that five foot survey</p> <p>7 indicate whether or not that area involved</p> <p>8 the installation of Conflow?</p> <p>9 A. Possibly.</p> <p>10 Q. You're not certain?</p> <p>11 A. I'd have to take a look at the</p> <p>12 survey and determine what direction was</p> <p>13 given.</p> <p>14 Q. And the 24th Street turnstile</p> <p>15 area where you also saw delamination, are</p> <p>16 you aware of whether that was over slab?</p> <p>17 A. I do not know that.</p> <p>18 Q. How about the same question, do</p> <p>19 you know if it was over Conflow?</p> <p>20 A. I do not know that. I'd have to</p> <p>21 take a look at the survey.</p> <p>22 Q. Do you know if it was over</p> <p>23 Mapacem?</p> <p>24 A. The turnstile areas, no, because</p> <p>25 Mapacem wasn't used in that area.</p>	<p style="text-align: right;">432</p> <p>1 R. Leu</p> <p>2 each and every one of these circles with</p> <p>3 you, would you be able to tell me, as you</p> <p>4 sit here today, whether or not the areas</p> <p>5 depicted in those circles as being</p> <p>6 sounding hollow, whether those were areas</p> <p>7 installed over Conflow?</p> <p>8 A. No, I cannot tell you</p> <p>9 definitively if they were or not.</p> <p>10 Q. Would you be able to tell me if</p> <p>11 that area was installed over slab?</p> <p>12 A. No.</p> <p>13 Q. Would you be able to tell me if</p> <p>14 that area was installed over Mapacem?</p> <p>15 A. I'd have to correlate that with</p> <p>16 the change order to see where Mapacem was</p> <p>17 played.</p> <p>18 Q. And would that five foot survey</p> <p>19 that was performed by Bartec, would that</p> <p>20 allow you to tell me whether or not it was</p> <p>21 installed over slab or Conflow</p> <p>22 definitively?</p> <p>23 A. The survey that was done by</p> <p>24 Bartec, that was the direction that was</p> <p>25 given to Trataros and Bartec to install</p>

51 (Pages 429 to 432)

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EXHIBIT 2

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 CASE NO.: 08-CV-6915 (DLC)

5 -----x
6 TRAVELERS CASUALTY AND SURETY COMPANY
7 as Administrator for RELIANCE INSURANCE
8 COMPANY,

9
10 Plaintiff,

11 -against-

12 DORMITORY AUTHORITY-STATE OF NEW YORK,
13 TDX CONSTRUCTION CORP. and KOHN PEDERSON
14 FOX ASSOCIATES, P.C.,

15 Defendants.

16 (CAPTION CONTINUED)

17 -----x

18 August 12, 2008

19 10:00 a.m.

20 DEPOSITION of CRAIG NEGUS,
21 held at the offices of Holland & Knight,
22 195 Broadway, New York, New York, before Eileen
23 Mulvenna, CSR/RMR, Certified Shorthand Reporter,
24 Registered Merit Reporter and Notary Public of
25 the State of New York.

<p style="text-align: right;">46</p> <p>1 Craig Negus</p> <p>2 A. Ray Leu.</p> <p>3 Q. Was anyone from Trataros involved in</p> <p>4 that process?</p> <p>5 A. Ramesh.</p> <p>6 Q. So after you shot elevations on one</p> <p>7 or two floors, you or someone from Bartec would</p> <p>8 record that on a floor plan; correct?</p> <p>9 A. Yes, or a straight piece of paper.</p> <p>10 Q. Okay. And what was the information</p> <p>11 you recorded? Was it strictly numbers or --</p> <p>12 A. Fractions. In terms of depth,</p> <p>13 correct.</p> <p>14 Q. Did it contain any -- withdrawn.</p> <p>15 You said some of it was recorded on</p> <p>16 a straight piece of paper?</p> <p>17 A. Yes.</p> <p>18 Q. On that piece of paper, did you</p> <p>19 indicate any column lines or other indicia to</p> <p>20 show where in the building the measurement was?</p> <p>21 A. Yes.</p> <p>22 Q. How did you do that?</p> <p>23 A. Titled it.</p> <p>24 Q. Did you use column lines?</p> <p>25 A. No. If I was close to a column</p>	<p style="text-align: right;">48</p> <p>1 Craig Negus</p> <p>2 meetings?</p> <p>3 A. The amount of correction needed.</p> <p>4 Q. Did Trataros participate in those --</p> <p>5 I'll withdraw that.</p> <p>6 Did Ramesh participate in those</p> <p>7 discussions?</p> <p>8 A. Yes.</p> <p>9 Q. The instances where Mr. Bartels was</p> <p>10 present, did he participate in those discussions?</p> <p>11 A. Yes.</p> <p>12 Q. And did Mr. Leu participate in those</p> <p>13 discussions?</p> <p>14 A. Yes. He had final say.</p> <p>15 Q. And as a result of those meetings,</p> <p>16 what would then transpire?</p> <p>17 A. I would be directed to correct the</p> <p>18 floor for levelness.</p> <p>19 Q. As a result of those meetings, were</p> <p>20 any documents created from the survey data that</p> <p>21 you had recorded?</p> <p>22 MR. PLATEK: By whom?</p> <p>23 MR. FROESSEL: Anyone.</p> <p>24 A. Yes.</p> <p>25 Q. Can you describe that for me.</p>
<p style="text-align: right;">47</p> <p>1 Craig Negus</p> <p>2 line, I would identify the column; but most of</p> <p>3 the time, just identified so everybody knew where</p> <p>4 it was on the piece of paper.</p> <p>5 Q. Can you describe for me what that</p> <p>6 might say.</p> <p>7 A. I'd identify a bathroom, the</p> <p>8 corridor that they sent me to by number, area, or</p> <p>9 off elevator number, elevator shaft number, or</p> <p>10 whatever.</p> <p>11 Q. Once you recorded the information,</p> <p>12 who would you take it to?</p> <p>13 A. I would take it back to Trataros,</p> <p>14 particularly Ramesh.</p> <p>15 Q. And to your knowledge, what did</p> <p>16 Ramesh then do with the information?</p> <p>17 A. Had a meeting with Ray Leu.</p> <p>18 Q. Would you be present at those</p> <p>19 meetings?</p> <p>20 A. Yes.</p> <p>21 Q. Do you recall anyone other than Ray</p> <p>22 Leu or Ramesh being present at those meetings?</p> <p>23 A. Occasionally Walter Bartels.</p> <p>24 Q. And can you -- what typically would</p> <p>25 be the nature of the discussion at those</p>	<p style="text-align: right;">49</p> <p>1 Craig Negus</p> <p>2 A. There was a set of plans, as my work</p> <p>3 proceeded, where it was marked where I had</p> <p>4 corrected the floor.</p> <p>5 Q. Was this -- was that something that</p> <p>6 was done after the surveying process was</p> <p>7 complete?</p> <p>8 A. No, it was done after -- after their</p> <p>9 decision on what to do, it was marked.</p> <p>10 Q. Do you know if that was done</p> <p>11 after -- if that -- withdrawn.</p> <p>12 Do you know if that document was</p> <p>13 created after the self-leveling underlayment was</p> <p>14 installed?</p> <p>15 A. Sometimes. And sometimes before.</p> <p>16 Q. Who created that document?</p> <p>17 MS. BONACCI: Objection to form.</p> <p>18 MR. FROESSEL: Actually, I'll</p> <p>19 withdraw the question.</p> <p>20 Q. Can you describe for me what the</p> <p>21 document looked like.</p> <p>22 A. It was a set of drawings.</p> <p>23 Q. Floor plans?</p> <p>24 A. Yes.</p> <p>25 Q. To your knowledge, was it a set of</p>

13 (Pages 46 to 49)

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<p style="text-align: right;">138</p> <p>1 Craig Negus</p> <p>2 drawings?</p> <p>3 A. No, I don't.</p> <p>4 Q. Did you ever -- did you ever see</p> <p>5 anyone writing on that set of drawings that had</p> <p>6 the elevations written on it?</p> <p>7 A. I don't recall whether I ever saw</p> <p>8 the actual transfer of my numbers onto that and</p> <p>9 by who, but it was transferred.</p> <p>10 Q. Did you ever -- the set of floor</p> <p>11 plans that had the elevations written onto it,</p> <p>12 did you ever see that in TDX's possession?</p> <p>13 A. I don't recall.</p> <p>14 Q. Did you ever see it in Trataros'</p> <p>15 possession?</p> <p>16 A. Yes.</p> <p>17 Q. Do you recall who from Trataros you</p> <p>18 saw in possession of that document?</p> <p>19 A. The answer again would be everybody.</p> <p>20 Q. Are you aware of any as-built</p> <p>21 drawing showing the locations where Bartec</p> <p>22 installed Conflow at Baruch College?</p> <p>23 MR. PLATEK: As opposed to the plans</p> <p>24 that he's already testified to?</p> <p>25 MR. FROESSEL: He talked about a</p>	<p style="text-align: right;">140</p> <p>1 Craig Negus</p> <p>2 colors were added after the fact, you're saying?</p> <p>3 A. I believe so.</p> <p>4 Q. What's the basis of your belief that</p> <p>5 the colors were added to the drawing after the</p> <p>6 Conflow was in place or the underlayment was in</p> <p>7 place?</p> <p>8 A. Because it was neat. It didn't have</p> <p>9 elevations on it.</p> <p>10 Q. Is that the document you said you</p> <p>11 saw Mr. Leu making markings on?</p> <p>12 A. I never saw Mr. Leu making markings</p> <p>13 on them. I don't know who did that.</p> <p>14 Q. Okay.</p> <p>15 A. I don't know who was the recorder.</p> <p>16 It could have been him, but I'm not -- you asked</p> <p>17 me before did I physically saw [sic] Mr. Leu</p> <p>18 write. I never did.</p> <p>19 Q. Okay. Did you ever have any</p> <p>20 interaction with anyone from G.M. Crocetti while</p> <p>21 you were working at Baruch College?</p> <p>22 A. No.</p> <p>23 I have to add to that. I'm wrong.</p> <p>24 I had some limited interaction with</p> <p>25 the foreman about covering the underlayment too</p>
<p style="text-align: right;">139</p> <p>1 Craig Negus</p> <p>2 before-the-fact set of drawings.</p> <p>3 MR. PLATEK: No, I don't --</p> <p>4 MR. FROESSEL: I'm talking about an</p> <p>5 as-built.</p> <p>6 MR. PLATEK: I don't -- I don't</p> <p>7 think that's what his testimony was, but</p> <p>8 I'll allow him to answer that question.</p> <p>9 MS. SMITH: Note my objection to</p> <p>10 that.</p> <p>11 MS. WISHERT: Join as well.</p> <p>12 A. "As-built" as meaning after the</p> <p>13 fact?</p> <p>14 Q. Yes.</p> <p>15 A. After the work was done?</p> <p>16 Q. Uh-huh.</p> <p>17 A. Yes.</p> <p>18 Q. Who prepared that drawing?</p> <p>19 MR. PLATEK: Objection.</p> <p>20 MR. FROESSEL: I'll withdraw the</p> <p>21 question.</p> <p>22 Q. Is that the same drawing we're</p> <p>23 talking about with the colors?</p> <p>24 A. Yes.</p> <p>25 Q. And all of that -- all of those</p>	<p style="text-align: right;">141</p> <p>1 Craig Negus</p> <p>2 soon. And it was a little bit out of line and I</p> <p>3 went right to Trataros with it.</p> <p>4 Q. Okay. Just to clarify that, did you</p> <p>5 feel that Crocetti was covering Bartec's</p> <p>6 underlayment too soon?</p> <p>7 A. Yes.</p> <p>8 Q. What were they covering it with?</p> <p>9 A. The terrazzo system. Sorry about</p> <p>10 that.</p> <p>11 Q. Do you recall who the -- who the</p> <p>12 Crocetti foreman was you spoke to?</p> <p>13 A. I don't know -- I don't remember --</p> <p>14 remember his name.</p> <p>15 Q. And you said you went and you</p> <p>16 complained to Trataros about that?</p> <p>17 A. Right, that's correct. Yes.</p> <p>18 Q. Who at Trataros did you go to with</p> <p>19 that complaint?</p> <p>20 A. Everybody again.</p> <p>21 Q. Do you recall what the response was</p> <p>22 that you got, if any?</p> <p>23 A. They made sure from that point on</p> <p>24 that he understood he had to wait seven days.</p> <p>25 Q. Okay.</p>

36 (Pages 138 to 141)

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